

Bye bye, ICC! The Philippines' farewell put into perspective

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Lasse Schuldt Do 15 Mrz 2018

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On 14 March 2018, Philippine President Rodrigo Duterte announced that the Philippines will withdraw from the International Criminal Court (ICC, the Court) “effective immediately.” Discarding official withdrawal procedures, the move came about a month after the ICC opened preliminary examinations into Duterte’s war on drugs to determine whether there was sufficient evidence to establish jurisdiction over the case. In his withdrawal announcement, Duterte complained, in particular, about a lack of respect for the principles of complementarity, due process and the presumption of innocence, and argued that the Rome Statute had not been properly published in the nation’s official gazette.

The development illustrates the general pressure on human rights in Southeast Asia, where the Rohingya crisis drags on in Myanmar, crackdowns take place on the opposition and dissenters in Cambodia, the space for freedom of speech and political activity shrinks in Thailand under an almost 4-year military rule, and where widespread displacement and disregard of environmental rights can be witnessed throughout almost all countries of the Association of Southeast Asian Nations (ASEAN).

More specifically, however, Duterte’s intention to reject the ICC’s jurisdiction exemplifies the Court’s fragile foothold across Southeast Asia. Cambodia and the Philippines have been the only two ICC members among the ten ASEAN countries. Thailand signed the Statute in 2000, but not yet proceeded to ratification. An explanation of this Southeast Asian hesitation may be found in distinct attitudes and principles within and between the ASEAN countries.

International criminal justice in Southeast Asia

Though the region has been the host of two ad-hoc tribunals applying international criminal law – the Special Panels for Serious Crimes (SPSC) in Timor-Leste and the Extraordinary Chambers in the Courts of Cambodia (ECCC) – both examples have not contributed to a more favourable perception of international criminal justice.

The SPSC had the mandate to exercise jurisdiction with respect to genocide, war crimes, crimes against humanity, murder, sexual offences, and torture allegedly committed by Indonesian-backed militia groups and military forces following the 1999 referendum that finally resulted in the independence of the Democratic Republic of Timor-Leste. In 2005, the SPSC completed their mandate after having handed down 84 convictions and three acquittals. However, most of the convicted perpetrators were low-level militia soldiers as opposed to high-rank army and militia members who are considered the most responsible for the crimes.

The ECCC, which are still active, deal with the crimes committed during the years 1975 to 1979 by the Khmer Rouge that resulted in the death of an estimated 1.7 million people accounting for about 20 percent of the Cambodian population at the time. The ECCC were put into operation in 2006 pursuant to an agreement between the United Nations and the Royal Government of Cambodia. The jurisdiction of the Extraordinary Chambers covers the crime of genocide, crimes against humanity, and grave breaches of the 1949 Geneva Conventions. Due to governmental interference and disputes between Cambodian and international judges, the ECCC's performance has often been criticized as unsatisfactory.

Complementing the work of ad-hoc tribunals, the establishment of the ICC was agreed upon at the 1998 Rome Conference. During the conference, the potential of a permanent court had also been voiced by the delegation of Thailand that stated that "tribunals set up to deal with specific situations did not offer an appropriate means of prosecuting all international crimes. [Thailand] hoped to see the establishment of a permanent, independent and truly impartial international criminal court."

Among the ASEAN states, Cambodia then was first to ratify the Rome Statute in 2002. The Philippines became the second and (so far) last ASEAN country to join when it ratified the Statute on 30 August 2011.

Looking back: Southeast Asian countries at the Rome conference

ASEAN countries' lack of legal commitment is in stark contrast to their active participation in the Rome Conference in 1998. While Cambodia and Myanmar did not attend, the remaining Southeast Asian participants issued an impressive number of statements clarifying their views on a variety of legal and political topics. These statements still provide valuable hints as to which issues were the most pressing among ASEAN countries.

National sovereignty and the question whether it will be in conflict with the principle of complementarity is the nucleus around which the most pressing issues circled at the Rome Conference. The delegation of Indonesia submitted: "In drafting the Statute, the Conference must uphold the principle of respect for national sovereignty and join the emerging consensus that the Court's jurisdiction should be complementary to that of national courts and based on the consent of the States concerned. (...) However, that principle [of complementarity] still had to be defined unambiguously." Vietnam echoed that "[a]ny action by the Court without the prior consent of the States concerned would constitute an encroachment on State sovereignty."

Investigations *proprio motu*

With regard to the Prosecutor's power to initiate investigations by his own decision (*proprio motu*) as opposed to a referral by a State Party, there was a divisive line separating those countries in favor of a powerful Prosecutor and those countries that opposed this concept. According to Indonesia's position, "[t]he Prosecutor should not be able to initiate investigations *proprio motu*." The delegation of Malaysia concurred "in view of the principle

of complementarity and the danger of adverse effects on the integrity and credibility of the office and possible accusations of bias.” Finally, “[t]o give the Prosecutor power to initiate proceedings *proprio motu* was unacceptable” for Vietnam, too.

On the other hand, the Philippines (!) submitted that “[t]he Prosecutor should be independent and be entitled to investigate complaints *proprio motu*, subject to the safeguards provided by a supervisory pre-trial chamber.” Equally, Thailand “could agree to the Prosecutor initiating investigations *ex officio* on the basis of information obtained from any source, including non-governmental organizations (...). It (...) endorsed the role of the Pre-Trial Chamber in considering the basis on which the Prosecutor should be allowed to proceed further with an investigation.”

Fear of politicization

One of the major issues brought up (not only) by ASEAN countries at the Rome conference was the fear that the Court could be used as a political weapon in order to drag a country before the ICC. Especially the power of the U.N. Security Council to refer a situation to the ICC sparked criticism among Southeast Asian countries. At a very early stage, Malaysia already asserted “[t]he role written in for a politicised Security Council is incompatible vis-a-vis that of a judicial institution like the ICC.” The delegation of Indonesia declared in Rome “that the Court must be independent of political influence of any kind, including that of the United Nations and in particular the Security Council, which must not direct or hinder its functioning.”

Indonesia, for its part, intertwined the fear of a politicized Court with the notion of regional particularities: “The danger of investigations being initiated for political motives could not be disregarded. While some had argued that the integrity of the Prosecutor and the filtering role of the Pre-Trial Chamber would provide safeguards against such investigations, neither Prosecutor nor judges could be expected to have a full understanding of the situation and internal security problems of each and every developing society.” With clear reference to the “Asian Values” debate, the delegation of Singapore stated that “account must be taken of the diversity of regional interests, different stages of development and social and cultural traditions, and the positions of the major Powers, in order to achieve a broad consensus and build an effective, working institution.”

Non-interference

To put these statements in perspective, it is worthwhile to recall ASEAN’s policy of non-interference. According to the preamble of the ASEAN Charter, ASEAN countries respect “the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity”. Art. 2(2) (e) expressly stipulates that ASEAN and its Member States shall act in accordance with non-interference in the internal affairs of ASEAN Member States.

The practical implementation of non-interference implied for a long time that ASEAN countries refrained from any criticism with regard to matters occurring in one of their fellow member countries, even in cases of systematic suppression of human rights. It is clear that

ASEAN's "non-interference" encompasses not only acts of coercion but also otherwise lawful acts such as condemning statements or criticizing comments. Though, sporadically, governments may voice "concerns" over certain developments in neighbouring countries, non-interference remains a firm cornerstone of Southeast Asian diplomacy and may therefore still serve as an explanation for Southeast Asia's hesitation towards the International Criminal Court. The Rome Statute enshrined a principle according to which the crimes within the ICC's jurisprudence never constitute an internal affair – a notion that may be particularly hard to digest for ASEAN countries.

Outlook

The Philippines withdrawal from the ICC may not yet be a done deal. Though President Duterte claims his announcement's immediate effect, the Rome Statute's Art. 127 stipulates that the withdrawal shall take effect one year after the date of receipt of notification. Therefore, also Philippine Judge Raul Cano Pangalangan may, for the time being, continue to serve on the Court.

However, the trend toward authoritarianism and reduced importance of human rights in the Philippines as well as throughout Southeast Asia is apparent. In Cambodia, where Prime Minister Hun Sen vigorously defends his grip on power, the developments in the Philippines are observed very closely.

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